

(f) *Official notice.* All matters officially noticed by the hearing officer shall appear on the record.

(g) *Burden of proof.* The burden of proof shall be upon the proponent of an action or affirmative defense, including, where applicable, mitigating factors, unless otherwise provided by law or regulation.

§ 26.25 Hearing officer's determination and order.

(a) *Scope of review.* The hearing officer shall conduct a de novo review of the administrative action to determine whether it is supported by a preponderance of the evidence, unless a different standard of proof is required by law or regulation. Each and every charge alleged by the Department need not be proven to support the administrative action. The hearing officer may modify or vacate the administrative action under review only upon a particularized finding of facts that justifies a deviation from the administrative action.

(b) *Closing of hearing.* At the discretion of the hearing officer, the closing of the record may be postponed in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each party shall be given an opportunity to respond to such evidence.

(c) *Briefs.* Upon conclusion of the hearing, the hearing officer may request the parties to file proposed findings of fact and legal briefs. The hearing officer shall make a written determination and order based upon evidence and arguments presented by the parties. The determination shall be founded upon reliable and probative evidence. This determination and order shall be served upon all parties.

(d) *Bench decisions.* Where the parties agree and where appropriate in the judgment of the hearing officer, a bench decision will be issued.

(e) *Time period for issuance of decision.* The hearing officer shall endeavor to issue a determination within 60 days from the date of the closing of the record.

(f) *Finality of determination.* The determination and order shall be final unless a party timely appeals the determination in accordance with § 26.26. The determination shall inform the

parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the hearing officer issues the determination, in accordance with § 26.26 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

SECRETARIAL REVIEW

§ 26.26 Review of determination of hearing officers.

(a) Except in matters arising under 2 CFR part 2424, any party may file with the Secretary an appeal within 30 days after the date that the hearing officer issues a determination or order. The Secretary or designee may extend the 30-day period, in the Secretary's sole discretion, for good cause.

(b) *Brief in support of appeal.* The appeal shall be accompanied by a written brief, not to exceed 15 pages, setting forth the party's specific objections to the determination or order of the hearing officer and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and conclusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition.* Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of receiving a copy of the appeal and accompanying brief. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the hearing officer's determination, or for objecting to any part of the hearing officer's determination.

(d) *Service.* The appeal and all briefs shall be served on all parties and on the Docket Clerk.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the hearing officer shall forward the

§ 26.27

record of the proceeding to the Secretary or the Secretary's designee.

(f) *Time extensions.* The Secretary, or designee, in his or her sole discretion, may extend the deadlines or page limitations set forth in paragraphs (b) and (c) of this section. The Secretary or designee may also permit the filing of additional briefs, in his or her sole discretion.

(g) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(h) *Interlocutory rulings.* There is no right to appeal any interlocutory ruling by the hearing officer, except as provided for in § 26.27.

(i) *Objection not raised before hearing officer.* In reviewing the determination or order, the Secretary, or designee, shall not consider any objection that was not raised before the hearing officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(j) *Evidence in the record.* The Secretary or designee shall consider only evidence contained in the record forwarded by the hearing officer. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material, and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the hearing officer for reconsideration in light of the additional evidence.

(k) *Ex parte communications.* The prohibitions of ex parte communications in § 26.3 shall apply to contacts with the Secretary or the Secretary's designee.

(l) *Determination.* The Secretary or designee may affirm, modify, reverse, remand, reduce, compromise, or settle any determination made or action ordered in the initial determination or order. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(m) *Written determination.* Where a request for Secretarial review has been timely made, the Secretary, or designee, shall issue a written determination within 30 days after receipt of the

24 CFR Subtitle A (4–1–14 Edition)

request for review, and shall serve it upon the parties to the hearing and the hearing officer. The Secretary, or designee, may extend the time in which a written determination must be issued by an additional 60 days for good cause shown in a written justification issued to the parties. The written determination of the Secretary shall be final. If the Secretary, or designee, does not act upon the request for review of a determination within 90 days of service of the request, then the initial determination shall be the final agency action.

§ 26.27 Interlocutory rulings.

(a) *Interlocutory rulings by the hearing officer.* A party seeking review of an interlocutory ruling shall file a motion with the hearing officer within 10 days of the ruling requesting certification of the ruling for review by the Secretary, or in cases arising under 2 CFR part 2424, with the Debarring Official. Certification may be granted if the hearing officer believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review.* Any party may file a petition for review of an interlocutory ruling within 10 days of the hearing officer's determination regarding certification.

(c) *Secretarial review.* The Secretary, or designee, or Debarring Official shall review a certified ruling. The Secretary, designee, or Debarring Official has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing.* Unless otherwise ordered by the hearing officer or the Secretary, designee, or Debarring Official, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the hearing officer shall be effective pending review.